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No. 87-2029

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS W. HILL, PETITIONER

v.

DEPARTMENT OF THE AIR FORCE,
PAUL S. BRITT, AND PAUL J. VALLERIE

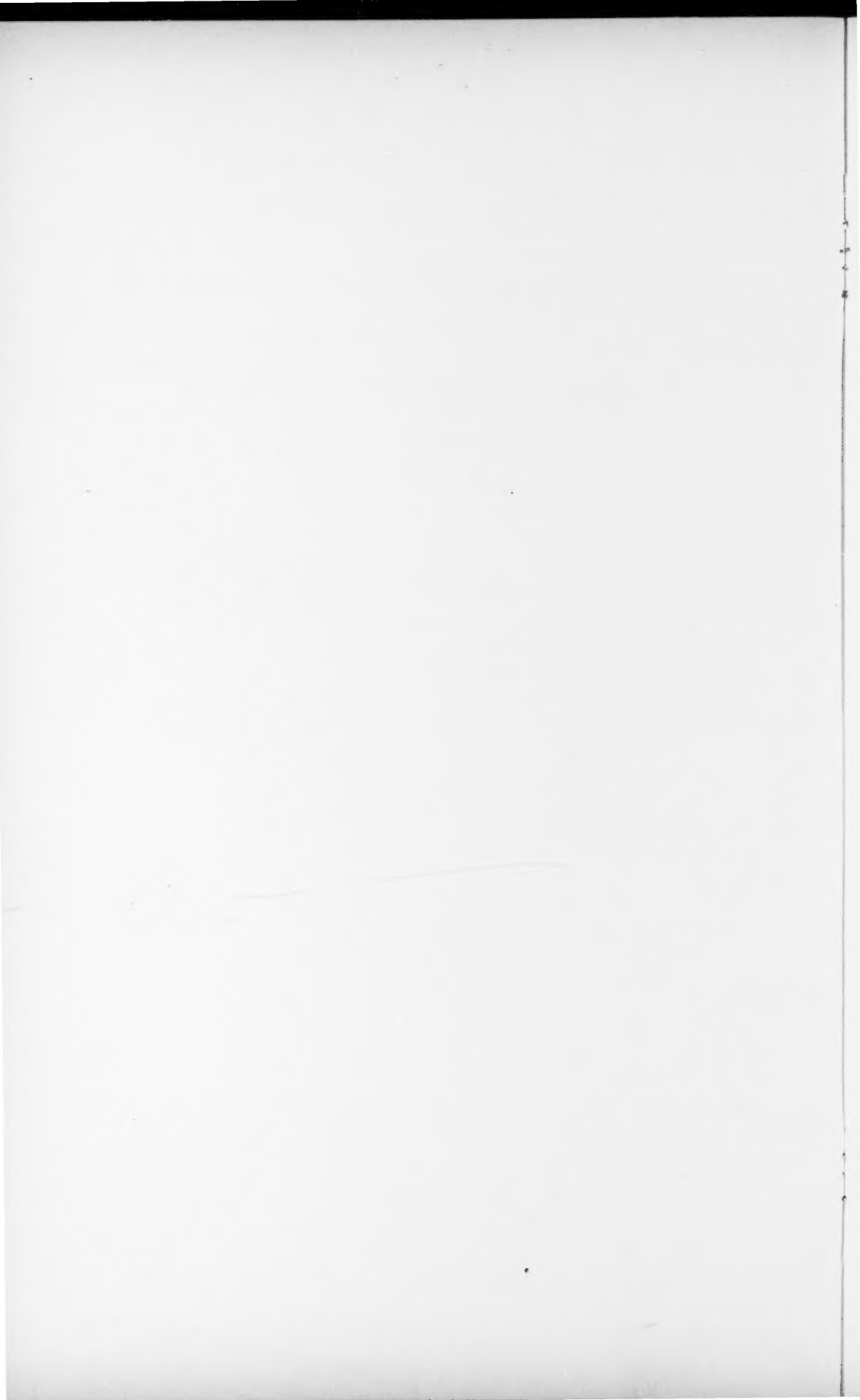
*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

	Page
Cases:	
<i>Department of the Navy v. Egan</i> , No. 86-1552 (Feb. 23, 1988)	3, 4
<i>Hill v. Dep't of the Air Force</i> , No. 86-1081 (Fed. Cir. Feb. 10, 1987)	2
<i>Webster v. Doe</i> , No. 86-1294 (June 15, 1988)	4
 Statutes and regulations:	
Privacy Act, 5 U.S.C. (& Supp. IV) 552a	5
28 U.S.C. 1331	3
32 C.F.R.	
Section 155	5
Section 155.3	5
Section 155.7(c)	5
Section 155.7(g)	5
Section 155.7(q)	5
Section 155.7(u)	5
 Miscellaneous:	
DOD Directive 5200.1-R, § 1-501 (1979)	2
Exec. Order No. 12,365, § 1.1(a)(1), 3 C.F.R. 166, 167 (1983 Comp.)	2



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Petitioner contends that the court of appeals erred in dissolving an injunction requiring the Air Force to reinstate his top secret security clearance and to notify any inquiring employer that he is entitled to access to classified materials.

1. Petitioner was a civilian employee of the Air Force from January 1966 to July 1985. Immediately prior to his termination, he had been assigned to Kirtland Air Force Base, New Mexico, where he worked in the Directorate of Aerospace Studies in space weaponry research (sometimes called "star wars" research). Pet. App. 2. In May 1985, the Air Force served him with a notice of proposed removal from the federal service based on his alleged misuse of government long distance telephone service and his unauthorized removal of records from the desk of a prior supervisor (*id.* at 3, 40). For the same reasons, the Air Force determined that petitioner was untrustworthy and

suspended his top secret security clearance (*id.* at 7, 40).¹ Petitioner was removed from his job in July 1985 (*id.* at 2).

Petitioner appealed his removal to the Merit Systems Protection Board (MSPB). He did not dispute that he had misused government telephone service or improperly removed records from his supervisor's desk, but instead argued that dismissal was not warranted for those offenses. The MSPB "fully adjudicated" his discharge claim, concluding that petitioner's " 'misconduct related to his integrity and trustworthiness' " (Pet. App. 51 (quoting MSPB Mem. Op. at 24)). The MSPB's decision upholding the removal was in turn affirmed by the Federal Circuit (*Hill v. Dep't of the Air Force*, No. 86-1018 (Feb. 10, 1987)).

After he was removed, petitioner sought employment in the private sector that required him to have access to classified information. He brought this suit in the United States District Court for the District of New Mexico challenging the suspension of his security clearance, and the court entered a preliminary injunction requiring the Air Force to restore the clearance. The court also ordered the Air Force to remove the "Z Code" modifier, a notation indicating that it might possess information pertinent to petitioner's suitability for a security clearance, from his records, and prohibited the Air Force from providing "derogatory information" about petitioner to employers. Pet. App. 16.

The court of appeals *sua sponte* remanded the case "for the limited purpose of allowing the district court to explain

¹ The classification 'Top Secret' applies "only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." Exec. Order No. 12,365, § 1.1(a)(1), 3 C.F.R. 166, 167 (1983 Comp.); see also DOD Directive 5200.1-R, § 1-501 (1979).

the basis for its jurisdiction" (Pet. App. 21). The district court thereafter issued an opinion (*id.* at 21-30) finding that it had jurisdiction under 28 U.S.C. 1331, the federal question provision, because petitioner had alleged that the suspension of his security clearance "resulted in deprivation of his fifth amendment rights to due process and equal protection of the laws" (Pet. App. 24-25) (footnote omitted)). The district court went on to conclude, with respect to petitioner's due process claim, that he had a property interest in his security clearance and a colorable claim that the suspension of his clearance infringed on a liberty interest (*id.* at 28). The court also concluded that its preliminary findings indicated that the Air Force may have treated petitioner arbitrarily, "implicat[ing] a violation of equal protection" (*id.* at 29).

After this Court issued its decision in *Department of the Navy v. Egan*, No. 86-1552 (Feb. 23, 1988), holding that the MSPB may not review a decision to deny or revoke a security clearance, the court of appeals remanded with instructions that the district court dissolve the preliminary injunction (Pet. App. 31-55).

2. As the court of appeals concluded, *Egan* disposes of petitioner's claims. The Court in *Egan* determined that the "predictive judgment" as to who should have security clearances "must be made by those with the necessary expertise in protecting classified information" and that "it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment" (slip op. 10). Accordingly, under *Egan*, as the court of appeals concluded, the district court erred in reviewing "the merits and motives of Air Force decisions relating to [petitioner's] clearance" (Pet. App. A42). While petitioner's claim differs from the claim in *Egan* in that he alleges constitutional violations, the court of appeals correctly noted that

if the holding in *Egan* "can be bypassed simply by invoking alleged constitutional rights, it makes the authority of *Egan* hardly worth the effort" (Pet. App. 44).²

In addition, since the Court stressed in *Egan* that "no one has a 'right' to a security clearance" (slip op. 9), the court of appeals correctly concluded that there was no basis for petitioner's claim that he had a property interest in his security clearance (Pet. App. 45). And since a "clearance does not equate with passing judgment upon an individual's character" (*Egan*, slip op. 9-10), the court of appeals correctly concluded that the Air Force had not infringed on any liberty interest by suspending petitioner's security clearance. In any event, as the court noted, the remedy for infringement of a liberty interest is a name-clearing hearing, and petitioner had already had an opportunity to clear his name in the MSPB proceeding in which he challenged his removal. The allegations that petitioner had misused government telephone service and removed records from a supervisor's desk served as the bases for both his removal and the suspension of his security clearance, and petitioner could have challenged those allegations in the MSPB proceeding, but did not. Furthermore, as the court noted (Pet. App. 48-49), petitioner, who has obtained a top secret security clearance and a job with a defense contractor, will have another opportunity

² The decision below is not inconsistent with the decision in *Webster v. Doe*, No. 86-1294 (June 15, 1988), where the Court held that a constitutional challenge to the dismissal of an agent of the Central Intelligence Agency was reviewable. In that case, the petitioner sought judicial review of his dismissal, not a decision to revoke his security clearance. Moreover, in that case no other avenue for obtaining judicial review was available, whereas the petitioner here was able to challenge his dismissal in the MSPB and the Federal Circuit. Petitioner's challenge to the suspension of his security clearance is therefore governed by *Egan*, not by *Webster v. Doe*.

to clear his name if he loses his clearance after the injunction is dissolved, since he may challenge the revocation of a clearance under 32 C.F.R. 155.³

The court of appeals also correctly concluded that whether a procedural violation was committed in the course of the suspension of petitioner's security clearance by the Air Force is a matter of no continuing importance. The MSPB concluded that petitioner was properly removed from the Air Force on the basis that he was untrustworthy, and its decision was upheld on appeal and is "conclusive and binding" (Pet. App. 51-52). Given that it is too late to restore petitioner to his position with the Air Force, the question whether the Air Force followed proper procedures in revoking the security clearance he held in connection with that position has no retrospective significance. As the court noted (*id.* at 53), if the security clearance petitioner currently holds is revoked after the injunction is dissolved, he may challenge that decision under 32 C.F.R. 155.⁴

³ Section 155 provides that a "security clearance shall not be revoked unless the applicant has been provided with a written Statement of Reasons" (32 C.F.R. 155.7(c)). The applicant may respond and obtain a hearing at which he (or his counsel) may present evidence and cross-examine adverse witnesses (32 C.F.R. 155.7(g)). The hearing examiner must make written findings "for or against the applicant with respect to each allegation in the Statement of Reasons" (32 C.F.R. 155.7(q)). The examiner's decision is subject to review by an Appeal Board, an expert panel within the Department of Defense (32 C.F.R. 155.3), and the Board must also issue a written opinion (32 C.F.R. 155.7(u)).

⁴ The other arguments advanced by the pro se petitioner, such as his contention (Pet. 33-41) that the Privacy Act, 5 U.S.C. (& Supp. IV) 552a, requires the Air Force to reinstate his security clearance and his contention (*id.* at 41-44) that his supervisor caused his security clearance to be suspended because he disliked petitioner, which were not addressed by the court of appeals, plainly do not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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